

FCC MAIL SECTION

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FEDERAL COMMUNICATIONS COMMISSION

FCC 99-131

DISPATCHED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)	
)	
JOSEPH FRANK PTAK)	CIB Docket No. 98-44
San Marcos, Texas)	
)	
)	
Order to Show Cause Why)	
A Cease and Desist Order)	
Should Not Be Issued)	

Appearances

Joseph Frank Ptak, pro se; and Pamera D. Hairston and W. Riley Hollingsworth on behalf of the Compliance and Information Bureau.

DECISION

Adopted: June 4, 1999 ; Released: June 9, 1999

By the Commission:

1. In this Decision, the Commission affirms the Summary Decision ("S.D."), 13 FCC Rcd 22168 (ALJ 1998), of Administrative Law Judge Richard L. Sippel ("ALJ"), which ordered Joseph Frank Ptak to cease and desist from making unauthorized radio transmissions in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, prohibiting radio communications without a license, and imposed a monetary forfeiture of \$11,000 for operating in violation of Section 301.

2. The Commission initiated this proceeding with an Order to Show Cause and Notice of Opportunity for Hearing, 13 FCC Rcd 10614 (1998) ("OSC"), which directed Ptak to show cause why he should not be ordered to cease and desist from violating Section 301 and designated the following hearing issues:

To determine whether Joseph Frank Ptak has transmitted radio energy without appropriate authorization in violation of Section 301 of the Act.

To determine whether, based on the evidence adduced pursuant to the preceding issue, Joseph Frank Ptak should be ordered to cease and desist from violating Section 301 of the Act.

The OSC also called for a determination, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), of whether an order of forfeiture in an amount not to exceed \$11,000 should be issued against Ptak for violations of Section 301.¹

3. On June 2, 1998, the Compliance and Information Bureau filed a motion for summary decision with the ALJ based on a showing that Ptak was operating a radio station without a license. Ptak did not respond to the Bureau's motion. In his S.D., released July 6, 1998, the ALJ granted the motion for summary decision after determining that the Bureau had "shown by a preponderance of substantial evidence that summary decision is warranted on the issue of the unauthorized operation of an unlicensed radio station and the issuance of a cease and desist order." S.D., ¶¶ 1, 2, 11. The ALJ also held that a forfeiture of \$11,000 is appropriate.

4. In a letter dated July 16, 1998 and sent to Chairman William E. Kennard, Ptak asserted that he was formally notifying the FCC of his intent to appeal any decision against him and to formally request that "the FCC reinstate a date for hearing to show cause why a case (sic) and desist order should not be issued to be held after alternative dispute resolution attempts are made." Although Ptak's July 16 letter did not show service on the Bureau and did not otherwise comply with the procedural requirements for filing pleadings in this proceeding, the Office of General Counsel, acting pursuant to delegated authority, made the letter a part of the record by placing a copy in the public Docket and afforded the Bureau an opportunity to respond to Ptak's contentions. In comments filed August 28, 1998, the Bureau argued that Ptak's complaints, e.g., that he was denied due process because the hearing venue was not changed from Washington to San Marcos and he was not allowed to replace his attorney, who is deceased, should be rejected because Ptak failed to demonstrate any error in the S.D. or any reason why the cease and desist order should not be issued and the forfeiture not be imposed. In another letter addressed to Chairman Kennard and dated August 28, 1998, Ptak set forth his position on "the relevant issues of jurisdiction and contested points in this matter," and stated that he would address the Bureau's response to his earlier letter "once it is legally served upon me." He further stated that he is "still waiting for legal delivery of the alleged Cease and Desist Order." The Office of General Counsel also placed Ptak's August 28 letter in the record of this proceeding.

5. The Commission's records confirm that Ptak received a copy of the S.D. by certified

¹The forfeiture amount was determined by using the statutory base amount \$10,000 for the violation at issue (construction and/or operation without an instrument of authorization for the service) which becomes \$11,000 with the inflation adjustment pursuant to the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-358 (1996). The maximum statutory forfeiture is \$11,000 for each day of a continuing violation up to a total of \$82,500 for each act or failure to act. See 47 U.S.C. § 503(b)(2)(C); 47 C.F.R. §§ 1.80(b)(3), (b)(4), (b)(5).

mail on August 29, 1998. Notwithstanding this personal service, Ptak did not file exceptions to the S.D. in accordance with the provisions of 47 C.F.R. §§ 1.276 and 1.277, which govern appeal and review of initial and summary decisions, and we are in receipt of no further correspondence or pleadings from Ptak relating to this proceeding.

6. Ptak is the owner or renter of a residence located at 505 Patricia Drive, San Marcos, Texas. From March 26, 1997 to the present, Ptak himself, or with the assistance of others, has operated a radio station at this address using the call letters "KIND." The station operates 24 hours a day seven days a week on 105.9 MHz, which is in the FM frequency band (98 MHz to 108 MHz). S.D., ¶ 5.

7. Ptak does not hold an authorization from the Commission to transmit radio signals on 105.9 MHz.² On April 9, 1997, Bureau field agents James D. Wells and Loyd P. Perry tracked the KIND emission and determined that the signal strength uniformly exceeded 250 microvolts/meter at 3 meters, which is the limit for unlicensed operation in the FM frequency band set forth in Section 15.239(b) of the Commission's rules, 47 C.F.R. § 15.239(b). Ptak's signal could be heard for approximately 10 miles. Id. at ¶ 6; Motion for Summary Decision, Exhs. 3, 4.

8. The FCC agents orally advised Ptak on April 9, 1997 that his operation of the station was in violation of federal law and ordered him to cease operations. Ptak did not do so. On April 17, 1997, Perry wrote a follow-up letter to Ptak informing him that unlicensed operation is a violation of Section 301 and could subject him to monetary fine and criminal sanctions including imprisonment. The letter also stated in bold face that unauthorized operation "should cease immediately." On March 20, 1998, FCC agents confirmed that Ptak continued to operate the station. I.D., ¶ 6; Motion for Summary Decision, Exh. 1, Attachment A.

9. The ALJ concluded that summary decision was appropriate because there was no genuine issue of material fact to litigate. Specifically, the ALJ noted, Ptak admitted the illegal operation and stated that he intends to continue operating unless ordered to terminate by a judge. The ALJ summarily rejected Ptak's position, stated in a late-filed response to the Bureau's request for admission of facts and genuineness of documents, that Ptak's station serves as an outlet for the expression of views that are protected by the First Amendment. In addition, the ALJ rejected Ptak's defense based on a claim that he sent a letter to the Commission asking for instructions about applying for a license and/or request for waiver, but received no response. The ALJ found that Ptak did not follow set procedures for applying for a waiver and had made clear his intention to continue broadcasting without a license or a waiver. Finally, in the absence of any good faith effort by Ptak to comply with the licensing requirement or demonstrate

²The corresponding channel for 105.9 MHz, Channel 290, is allocated to Round Rock, Texas, a community located approximately 45 miles north of San Marcos. I.D., ¶ 6 n. 1.

an inability to pay, the ALJ concluded that the proposed \$11,000 forfeiture was warranted.

10. Notwithstanding Ptak's failure to file exceptions to the S.D. in accordance with the procedural requirements set forth in 47 C.F.R. §§ 1.276 and 1.277, the Commission has reviewed the arguments presented by Ptak in his letters dated July 16 and August 28, 1998. We have done so in response to Ptak's expressed intention to appeal an adverse decision by the ALJ and in recognition of Ptak's assertion that he is without legal representation. Our review of the record makes clear that the S.D. is correct in all respects.

11. The Communications Act precludes any person from transmitting radio signals within the United States without a license. 47 U.S.C. § 301. Under the Commission's rules, low power transmissions in the 88 to 108 MHz band are exempt from FCC licensing requirements if the field strength of the emissions does not exceed 250 microvolts/meter at a distance of 3 meters. 47 C.F.R. § 15.239(b). Ptak does not deny that he has been broadcasting on 105.9 MHz since March 1997 without a license in violation of 47 U.S.C. § 301 and is continuing to do so. It is also undisputed that Ptak's operation exceeds the permissible power limits specified in 47 C.F.R. § 15.239(b) for unlicensed facilities. Although Ptak received both oral and written warnings from Commission officials that his operations were illegal, he continued to violate Section 301. In these circumstances, the ALJ properly concluded that a cease and desist order should issue.

12. Insofar as Ptak presses a constitutional argument in defense of his unauthorized operation, the Commission and the courts repeatedly have made clear that there is no First Amendment right to broadcast without a license. See National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943) ("The right of free speech does not include, however, the right to use the facilities of radio without a license."); United States v. Dunifer, 997 F.Supp. 1235, 1241 (N.D. Cal. 1998), motion to alter or amend judgment denied, November 18, 1998, appeal pending, No. 99-15035 (9th Cir. 1999); Creation of a Low Power Radio Service, FCC 99-6, released February 3, 1999 at n. 16; Stephen Paul Dunifer, 11 FCC Rcd 718, 720-21 (1995), and cases cited therein. This is true for low power operations as well as for other radio stations. Id.; see also Turro v. FCC, 859 F.2d 1498, 1500 n. 2 (D.C. Cir. 1988) (rejecting a First Amendment challenge to denial of request for waiver of rule prohibiting program origination by FM translator station).

13. We also disagree with Ptak's claim that the Commission "lacks jurisdiction" because the radio transmissions at issue are solely within the state of Texas. In this regard, Ptak relies on a Commission form letter, sent in response to an inquiry from an unlicensed broadcaster in another proceeding, that purports to disavow federal jurisdiction over all intrastate radio transmissions. The Commission explained in a subsequent letter to that unauthorized operator, however, that his question was misunderstood and answered inaccurately. The second letter correctly stated that Section 301 explicitly sets forth the Commission's jurisdiction over all radio transmissions, both interstate and intrastate, and we reiterate that view here. See Keith Perry,

FCC 98-327, released December 23, 1998, at n. 1; see also 47 U.S.C. § 152(b). We also concur with the ALJ's findings that Ptak did not file an application with the Commission or formally seek a waiver of the rules to permit his low power operation, and that Ptak continued to operate even without a waiver.³ Various other contentions by Ptak, relating to matters such as the proper venue for hearing and requests for party status by his station volunteers and listeners, were considered and rejected for reasons adequately stated by the ALJ in the S.D. and his other rulings below.⁴ Ptak's remaining arguments, pertaining to the programming of his station and other area stations, the presence or absence of harmful interference, and the purported lack of citizen access to the airwaves, are not material to the issues in this proceeding and the issuance of a cease and desist order.

14. Finally, insofar as Ptak pleads the cause of microbroadcasting generally, we point out that the Commission recently adopted a Notice of Proposed Rule Making to explore the possible authorization of new, low power FM radio stations, including the creation of a 100-watt secondary service. See Creation of a Low Power Radio Service, FCC 99-6, at 1. We did so in recognition of the growth in radio ownership consolidation over the past few years as a result of the liberalization of our local radio ownership rules, and in response to the increasing public demand for additional outlets of public expression which could expand the diversity of voices. Id. at 6, 40. The proposed rules are prospective in nature, however, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations.

15. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 U.S.C. § 312(b), Joseph Frank Ptak, and all persons in active concert or participation with him, SHALL CEASE AND DESIST from making unauthorized radio transmissions in violation of 47 U.S.C. § 301.

³Ptak refers to a letter he and others who operate the station sent to the Commission in March 1997, requesting a rule waiver and enclosing a check in the amount of \$25 "to cover application and processing fees." By letter dated June 9, 1997, and addressed to J. Patrick Wiseman, whom Ptak designated as his legal representative, the Bureau responded to Ptak's inquiry. The Bureau stated that Ptak's unlicensed broadcast operation was in violation of Section 301, that it is subject to civil sanction or criminal penalty, that it should be discontinued, that his general request for a waiver was insufficient, that Ptak was required to apply for a license together with a fully supported request for waiver of the relevant rules that limit low power radio service, and that the \$25 check was being returned. Motion for Summary Decision, Exh. 4, Attachment D. Notwithstanding this detailed advice from the Bureau, Ptak did not file an application or a proper request for waiver, and he has continued to operate his station.

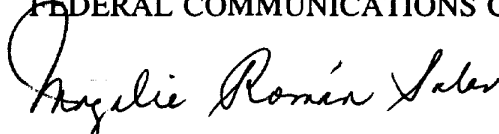
⁴The ALJ properly ruled in the S.D. that the question of hearing venue was moot in view of the summary disposition of the proceeding. He also correctly held that the multiple motions for party status did not satisfy Commission standards for party intervention under 47 C.F.R. § 1.223(b). See Order, FCC 98M-62, released May 22, 1998.

16. IT IS FURTHER ORDERED That, pursuant to 47 U.S.C. §503(b), Joseph Frank Ptak SHALL FORFEIT to the United States the sum of eleven thousand dollars (\$11,000) for willful violation of 47 U.S.C. § 301.⁵ Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the Federal Communications Commission, within forty (40) days of the release date of this Decision, to Federal Communications Commission, P.O. Box 73482, Chicago, IL. 60673-7482.

17. IT IS FURTHER ORDERED That a copy of this Decision shall be sent to Joseph Frank Ptak by Certified Mail - Return Receipt Requested.

18. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁵A claim of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting principles for the most recent three year period. This information must be submitted within thirty (30) days of the release of this Decision to FCC, Compliance and Information Bureau, Compliance Division, 445 12th Street, S.W., Washington, D.C. 20554.